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IN THE

Supreme Court of the United States

October Term, 1954

No. 186.

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. of L., an Unincorporated Labor Union; PAUL W. PRIDDY, JOSEPH BURRELL, STOY DECKER, WILLARD MARPLES, JAMES MALLORY, ALMA HARPER, Individually, and as Representatives of a Class Consisting of Members of General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union, - Petitioners,

versus

THE AMERICAN TOBACCO COMPANY, INC., - Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

Respondent, The American Tobacco Company, Inc., respectfully requests that the Petition for a Writ of Certiorari herein be denied upon the grounds hereinafter set forth:

OPINIONS BELOW.

The opinions of the Jefferson Circuit Court, Chancery Branch, are unreported. The memorandum opinion of April 23, 1953, appears in the petition on pages 25-6. The opinion of April 22, 1953, which petitioners have not included in their petition, appears in Appendix A hereto. The opinion of the Court of Appeals of Kentucky, as originally handed down, is reported in 258 S. W. 2d 903. The opinion as modified on rehearing is reported in 264 S. W. 2d 250. For the convenience of this Court, we have printed these opinions in Appendix A in a consolidated form, in order to show the modifications made to the first opinion by the second.

STATUTES INVOLVED.

Petitioners, in their reproduction in their Appendix A of Section 8(b)(4) of the Labor Management Relations Act of 1947, have omitted the important introductory words "It shall be an unfair labor practice for a labor organization or its agents—" A correct reproduction of this section is contained in Appendix B hereto.

QUESTIONS PRESENTED.

Under this heading, petitioners have included as question 1 (b) a point regarding the alleged primary jurisdiction of the Interstate Commerce Commission. It is submitted that this is not a question properly pre-

sented in this case. That point was not raised by petitioners in the lower court or on the appeal to the Court of Appeals of Kentucky. Petitioners attempted to raise it for the first time on a petition for rehearing in the Kentucky Court of Appeals, but there is no sufficient showing that that Court ever decided the point on the merits.

Petitioners omit from their statement under this heading the question whether this Court should pass upon any of the matters involved in this case in view of the fact that the strike which occasioned the litigation was completely settled and ended in June of 1953 and the decision below is in effect, if not in form, entirely moot as concerns these parties.

The question decided in this case was stated by the Kentucky Court of Appeals as follows, 264 S. W. 2d at 254:

> "The appeal involves the refusal of employees of common or contract carriers who are not on strike but who happen to belong to Local 89, the bargaining representative of Suppliers' employees, to transport the merchandise of American through the picket line at 17th and Broadway Streets, and his disobedience is not complained of as an unfair labor practice but as a violation of the common law, the statutory law and the Constitution of Kentucky."

Although, as stated by that Court, the conduct in question was "not complained of as an unfair labor practice," petitioners rely upon the proviso in Section 7 of the Labor Management Relations Act, 1947, which

defines unfair labor practices, as ousting the Kentucky courts of jurisdiction. The Kentucky Court of Appeals has held only that the proviso in question, to the effect that a refusal to cross a picket line in certain circumstances does not constitute an unfair labor practice, has no application, and does not oust the state court of jurisdiction, in a case which does not in any way involve a charge of unfair labor practice.

SUPPLEMENTARY STATEMENT OF THE CASE.

At the outset of this suit a temporary restraining order was entered which forbade refusals to deliver merchandise to respondent in somewhat broader terms than appeared in the permanent injunction.

At the trial which resulted in the permanent injunction, the Court also heard evidence as to whether a number of emloyees of a common carrier had violated the restraining order by refusing to deliver to respondent a shipment of merchandise, under circumstances which would also have constituted a violation of the permanent injunction. The carriers at all times admitted their obligation to render service to Respondent, and through managerial employees, cooperated with respondent's efforts to force their employees to handle respondent's goods. There was no evidence that the refusals were due to threats or physical restraint by the pickets, and, in fact, adequate police protection was available at all times. On this issue petitioners' President, Mr. Priddy, testified that he, on behalf of Local 89, had given a direct order to all

the paid employees of the Union and to a general meeting of the entire membership of the Union that the carriers' employees should continue to handle respondent's shipment (Record, Vol. 3, pp. 229-231, 241). The trial court refused to hold the Union (as an entity) in contempt and dismissed the rule as to it, while fining the individual truck drivers who had refused to deliver to respondent (Record, Vol. 1, pp. 146-7).

While, therefore, as the Kentucky Court of Appeals pointed out, it "so happens in this instance that the carrier employees are members of the same union" as the striking employees, their position here is the same as though they were members of a totally different union. The carrier employees were not on strike and were continuing in the service of their employer. Further, in refusing to perform their duties, the carriers' employees were not acting as agents of, nor on behalf of, the Union.

On June 15, 1953, the strike ended and a contract covering wages and working conditions was entered into between respondent and Local 89 as representative of its employees, and since that date there have been no further refusals by employees of carriers to handle respondent's goods. No appeal was taken from the portion of the injunction limiting the number of pickets. Nor has any appeal been taken from any of the judgments imposing fines for contempt.

ARGUMENT.

1. Analysis of the Injunction.

The portion of the permanent injunction involved in this appeal is very short, and analysis shows that its wording was carefully chosen by the trial judge to make sure that it did not impair any federal rights of the affected employees or infringe upon the jurisdiction of the National Labor Relations Board or the Interstate Commerce Commission.

It enjoins the Union, its members, and their confederates and associates:

> "4. From causing, aiding or abetting any common carriers or contract carrier unreasonably to discriminate against plaintiff by refusing while remaining an employee thereof, or inducing, encouraging, coercing or otherwise causing or arranging with common or contract carriers or any persons connected therewith to refuse to accept, handle, transport, and deliver, in accordance with their legal and contract obligations, property shipped by or to plaintiff, so long as property is being handled, transported and delivered by or to other customers of such contract or common carriers."

The primary act enjoined is the refusal of the carriers' employees to perform their legal duties, and Petitioners' argument is addressed to this portion of the Injunction rather than to the secondary portion which forbids "inducing, encouraging, coercing * * *" the refusal. Assuming that the Court may properly en-

join accomplishment by indirection if it may enjoin the direct act, the exact terms and limitations of the primary portion of the Injunction become the controlling issue in this case. As to this, it will be noted that it does not apply to carriers, nor to the Union as an entity, nor to the striking employees of respondent's subsidiary, but only to a limited portion of the Union's members who are employees of common and contract carriers. Thus it applies only to those who are subject to the Ky. Rev. Stat. §281.685; the employees of non-carriers are not affected.

It applies to these employees only "while remaining an employee," so it does not impair their right to quit.

It applies only "so long as property is being handled, transported and delivered by or to other customers," so it does not impair the right of the carrier employees to strike.

It only forbids refusal to handle goods "in accordance with their legal and contract obligations" and then only when the result is to cause the carriers "unreasonably to discriminate," *i. e.*, to violate the Constitution and statutes and common law of Kentucky. Ky. Rev. Stat. §281.685.

Petitioners state in brief (pp. 6, 13) that it applied to "any customer of any such common carriers engaged in a labor dispute" and to "respondent's subsidiary's premises" (p. 6). More accurately, it applies only to "property shipped by or to plaintiff" (respondent). Respondent's subsidiary's Louisville plants closed down completely during the strike. No shipments to

or from those plants and no picket line other than that around respondent's premises, were ever in question.

It does not apply to picketing or affect the right to picket.

In short, the provision does not require any member of petitioners to perform service without his consent. He is free to strike or quit at any time. But if he chooses to work for a carrier he is obligated to obey the law of Kentucky governing carriers so long as he does so.

The decision of the Court of Appeals of Kentucky affirming this injunctive provision was made pursuant to a long-established rule in that and many other States. As that Court pointed out, 264 S. W. 2d at 253:

> "The rule of law that common carriers and their employees must serve all members of the public without discrimination is firmly established in Kentucky and, as far as we can find, in all the states. Its origin goes far back into the common law. Section 196 of the Constitution of Kentucky embodies the principle in this language: 'Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability.' Subsections 1 and 2 of KRS 281.685 read in part that no common or contract carrier shall 'subject any person to any unreasonable discrimination.' KRS 281.990 (1) stipulates that any person who 'violates, or causes, aids or abets any violation of, any of the provisions of this chapter,'

which includes KRS 281.685 (1) and (2), 'shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days or both."

These statutes, as the Court pointed out, subject these employees to both civil and criminal prosecution. It concluded, 264 S. W. 2d at 254:

> "We find nothing in the provisions of the above Act [the Labor Management Relations Act, 1947] nor in the decisions of the Supreme Court of the United States construing it that makes such conduct legal when from time immemorial the several states have branded it as illegal."

2. This Case Is Not of Sufficient Current Importance to Justify Review by This Court.

This case arises out of a labor dispute which began in March, 1953, and ended in June, 1953. Since that time there has been no labor dispute between Suppliers and Local 89, and the employees of common carriers who are members of Local 89 have not refused to make deliveries to respondent. For all practical purposes, this case came to an end more than a year ago. There is no matter of pressing importance which requires decision by this Court.

There remains in effect a permanent injunction issued by the Jefferson Circuit Court, Chancery Branch, which was affirmed by the Court of Appeals of Kentucky. It is this injunction alone which keeps this case from being wholly moot; but the fact that a case technically is not moot does not mean that it requires

decision by this Court. For over a year respondent, Suppliers, and the members of Local 89 (both those who work for Suppliers and those who work for the common carriers in and around Louisville) have gone their ways and carried on their activities as they normally would in times of labor peace, just as if the paragraph of the permanent injunction which petitioners complain about were not in effect. This paragraph does not command petitioners to do anything different from what they would normally do; it is thus not hanging over the heads of petitioners as a constant threat. If petitioners dislike the existence of an injunction which commands them to do what they normally would do, they may easily seek to have the equity court terminate its decree. It is well settled that an equity court may dissolve its injunctions when it appears that they have been faithfully complied with, that future breaches are not anticipated, and the interests of justice so require.

In *Gregory* v. *Crain*, 291 Ky. 194-198, 163 S. W. 2d 289, the Kentucky Court of Appeals adopted the statement of the law in 28 *Am. Jur.* §323, as follows:

> "There is no doubt but that the court which renders a decree for a permanent or perpetual injunction may open or modify the same where the circumstances of the parties are shown to have so changed as to make it just and equitable to do so, * * * The court has inherent power in this respect and may exercise it after the term in which the decree is rendered."

Further stating (p. 199) that:

> "* * * all courts, as well as text-writers, are in accord with what we have stated to the effect that the authority conferred by the law upon courts to issue injunctions is flexible, and the discretion which is vested in the court is to be measured by the facts in each case, including the consequences that might be entailed as a result of granting the relief."

3. No Question is Presented of Conflict Between State Jurisdiction and That of the National Labor Relations Board.

(a) NO RIGHT GUARANTEED BY THE LABOR MANAGEMENT RELATIONS ACT, 1947, OR OTHER FEDERAL LAW IS INFRINGED BY THE INJUNCTION.

The employees of a common or contract carrier have a duty of performing their services for all shippers without discrimination under the common law, the constitutional and the statutory law of Kentucky.* In this respect they are in an entirely different situation from the employees of an ordinary private employer who may lawfully give or withhold services from any customer at his pleasure.

That carriers' employees have the right to strike is beyond question. But the injunction here recognizes that right. It only prohibits refusal to handle respondent's goods while handling goods for others. Thus the only right in question is the right of a carrier's employee to discriminate against one shipper while continuing to serve other customers and remaining a work-

*Appendix B, pp. 59-60.

ing employee of the carrier. Neither the Labor Management Relations Act (Sections 7, 8b4, and 13 are cited by Petitioner), nor any decided case indicates that any such right exists.

Section 7 of the Labor Management Relations Act, so far as here applicable, provides:

> "Employees shall have the right to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * other mutual aid or protection."

In *Auto Workers* v. *Wisconsin Board,* 336 U. S. 245 (1949), this Court held, at 257 *et seq.,* that this section was intended to prevent otherwise lawful activities to aid unionization being treated as illegal conspiracies because they were undertaken by many persons acting in concert, but that it did not mean that otherwise illegal action is made legal because undertaken by persons acting in concert.

Section 13 of the Labor Management Relations Act provides:

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Again, in the *Auto Workers,* case, *supra,* the union had adopted the tactics of causing sudden, unexpected and irregular work stoppages, illegal under Wisconsin law. It was contended in this Court that the Wisconsin courts were powerless to enjoin this conduct be-

cause of Section 13 of the Labor Management Relations Act. This Court held, at 264-5:

> "If we were to read §13 as we are urged to do, to make the strike an absolute right and the definition to extend the right to all other variations of the strike, the effect would be to legalize beyond the power of any state or federal authorities to control not only the intermittent stoppages such as we have here but also the slowdown and perhaps the sit-down strike as well. Cf. *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 751.
>
> "We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by federal statute nor was it legalized and approved thereby. Such being the case, the state police power was not superseded by congressional Act over a subject normally within its exclusive power and reachable by federal regulation only because of its effects on that interstate commerce which Congress may regulate. *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1; *Bethlehem Steel Co.* v. *Board*, 330 U. S. 767.
>
> "We find no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate a course of conduct neither made a right under federal law nor a violation of it and which has the coercive effect obvious in this device."

With respect to Section 8b4, in the *Rockaway News* case, 345 U. S. at 80, it was said:

> "In the section by which the Labor Management Relations Act prescribes certain practices of

labor organizations which shall be deemed unfair, there is a proviso that nothing therein 'shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act * * *' This clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree."

But that does not mean that such a provision invalidates existing law or excuses its observance.

The Court in the *Rockaway News* case did not accept the view expressed in the dissenting opinion, 345 U. S. at 81, that this "takes away rights of employees which the Taft-Hartley Act left standing."

Conceding that this proviso does not "make unlawful" a refusal not theretofore unlawful, nevertheless it certainly does not attempt to legalize refusal that was previously forbidden by the law relating to carriers.

And if a private employer's contract with its employees justifies enforcement of a *contractual* duty to cross a picket line, certainly the public interest justifies enforcement of the *legal* duty to cross a picket line which the law of carriers has always imposed upon carriers' employees.

In *Rabouin v. National Labor Relations Board,* 195 F. 2d 906 (1952), the validity of a provision au-

thorizing union employees to respect picket lines was not decided. The court merely held that the union's request not to handle Rabouin's goods was addressed to employers, not to employees, and therefore was not an unfair labor practice under the Labor Management Relations Act. The duty of a common carrier and its employees to serve without discrimination was not touched upon.

(b) THE LABOR MANAGEMENT RELATIONS ACT, 1947, OFFERS NO REMEDY FOR THE INJURY TO WHICH THE INJUNCTION APPLIES.

Section 10 (a) of the Labor Management Relations Act empowers the Board to prevent any person from engaging in any unfair labor practice *listed in Section 8* of the Act and affecting commerce.

In other words, the section defines certain specified acts which are unfair labor practices if and when committed "by a labor organization or its agents." The section then contains a proviso as follows:

> "*Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

Under this proviso, refusal to cross a picket line under the circumstances stated in it is expresssly excluded from the unfair labor practices which the Na-

tional Labor Relations Board may prevent a union or its agents from committing.

The holding of the Court of Appeals of Kentucky in this case that respondent and its subsidiary "operate as a unit" and that their alliance "is so close that both may be considered as one operation," 264 S. W. 2d at 252, makes this proviso apply. The Board therefore was not authorized to take action with respect to the refusal of the truck drivers to cross the picket line.

A second ground upon which the National Labor Relations Board would have refused to take jurisdiction is that, as we have emphasized, Section 8 (b) of the Act applies to acts of labor organizations and their agents; except when they are acting as agents of a labor organization, it does not apply to acts of individual employees.

The Union in the present case expressly disclaimed responsibility for the drivers' refusals to cross the picket line and took the position that it desired them to do so, as noted in the supplementary statement of facts above. The refusals which occurred and were punished were therefore the spontaneous refusals of individuals, and not acts of a labor organization, or its agents.

The National Labor Relations Board therefore was without jurisdiction or power to control either the acts that were done or the individuals who were guilty of doing them. It is apparent, therefore, that the action involved here was, as the Kentucky Court of Appeals held, "not complained of as an unfair labor practice,"

264 S. W. 2d at 254, and does not fall within the jurisdiction of the National Labor Relations Board.

Since the carriers' employees affected by the injunction were not thereby deprived of any right guaranteed them by Federal law, and no Federal remedy for wrongful conduct has been provided, the State court properly took jurisdiction to protect respondent from irreparable injury, under the holding of this Court in *United Construction Workers* v. *Laburnum Corp.*, 347 U. S. 656 (1954), and the cases therein cited.

In interpreting the Labor Management Relations Act this Court has not lightly attributed to Congress an intention to override State law. *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 749 (1942), cited with approval in *International Union, United Automobile Workers of America* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 252-3 (1949).

In *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (1942), this Court affirmed the right of a State to enjoin mass picketing accompanied by threats and violence. This Court recognized that "a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways," and said, "We will not lightly infer that Congress by the mere passage of a Federal Act has impaired the traditional sovereignty of the several States in that regard." 315 U. S. at 749.

A particularly apposite case is *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949). There this

Court upheld provisions of a Missouri statute forbidding restraints of trade as against contentions that it violated the Constitution of the United States. A union of ice peddlers in Kansas City, Missouri, sought to induce all non-union peddlers to become members. It exerted compulsion upon them by inducing wholesalers of ice to refrain from selling ice to any but union peddlers. The Empire Storage & Ice Co. refused to yield to union compulsion, claiming that if it did so, it would violate the Missouri statute penalizing restraints of trade. Missouri enjoined the union from picketing the building of Empire Storage & Ice Co., and this Court affirmed, concluding, 336 U. S. at 504:

> "While the State of Missouri is not a party in this case, it is plain that the basic issue is whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City, Missouri. Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way. The state has provided for enforcement of its statutory rule by imposing civil and criminal sanctions. The union has provided for enforcement of its rule by sanctions against union members who cross picket lines. * * * We hold that the state's power to govern in this field is paramount, and that nothing in the constitutional guaranties of speech or press compels a state to apply or not to apply its anti-trade-restraint law to groups of workers, businessmen or others."

The parallels to the case which petitioners seek to bring to this Court are obvious. Kentucky has regulated common carriers one way. Petitioners have adopted a program to modify the duty of common carriers to serve their customers. The Court of Appeals of Kentucky resolved the conflict in favor of the power of the State, and that resolution, under the decisions of this Court, is correct.

In *Local Union No. 10, United Association of Journeymen Plumbers & Steamfitters* v. *Graham*, 345 U. S. 192 (1953), this Court upheld the right of Virginia to enforce its public policy that neither membership nor non-membership in a labor union should be made a condition of employment. The right of Virginia to enjoin peaceful picketing carried on in violation of the statute was recognized.

Petitioners seek to present their case to this Court for a decision upholding an abstract right to refuse to cross picket lines. Whatever may be said of this right, it is less important than the firm public policy of Kentucky that common carriers and their employees shall carry out their duties.

4. The Question of Interstate Commerce Commission Jurisdiction Was Not Timely Presented to the State Court; it is Not Raised in the Pleadings and Was First Argued on the Petition For Rehearing; and it Does Not Appear That it Was Decided on the Merits, or Otherwise, Since State Law Does Not Require the Courts of Appeals of Kentucky to Adjudicate the Merits of a Question Not Raised in the Trial Court.

Was respondent's only remedy for the refusal of the truck drivers to cross the picket line an application to the Interstate Commerce Commission for a determination that it constituted a discriminatory practice, and then a further application to the Commission to proceed under Section 222 (b) of the Interstate Commerce Act, 49 U. S. C. §322 (b), to enforce its order?

This contention was first raised by petitioner in its petition for rehearing, after the decision of the case on the merits by the Court of Appeals, although the fact that transportation in interstate commerce was involved was obvious from the commencement of the suit. The point was not raised by the pleadings, nor covered by the record upon which the Court of Appeals decided the case. The original opinion of the Court of Appeals did not refer in any way to the question of interstate commerce, and none of the modifications* made pursuant to the petition for rehearing refer or relate to it. It is not discussed and no authorities are cited. There is nothing in the record or in the final opinion to indicate that the question of Interstate

*See Appendix A, pp. 52, 54, 56, 57.

Commerce Commission jurisdiction was considered or determined *on its merits.*

The situation is thus no different from that in *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 117 (1923):

> "All that appears is that after the judgment of affirmance the plaintiffs sought to raise the question by a petition for rehearing, which was denied without opinion. But that effort came too late. *Bushnell* v. *Crooke Mining & Smelting Co.*, 148 U. S. 682, 689; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179; *Citizens National Bank* v. *Durr*, 257 U. S. 99, 106 * * *. It is at least doubtful that the question is one of any substance, but its tardy presentation renders further notice of it unnecessary."

A similar holding appears in *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 455 (1924):

> "This Court has always held it a prerequisite to the consideration here of a federal question in a case coming from a state court that the question should have been raised in that court before decision, or that it should have been actually entertained and considered upon petition to rehear. A mere denial of the petition by the state court without opinion is not enough."

See, also, *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 163 (1932).

Petitioners' effort to bolster their position by the certificate of Mr. Justice Stewart, of the Court of Appeals of Kentucky, is unavailing.

For one thing, the certificate is insufficient under the rule of *Charleston Federal Savings & Loan Association* v. *Alderson,* 324 U. S. 182, 186 n. 1 (1945). In that case this Court refused to accept a memorandum opinion of the presiding justice of a State court of last resort to the effect that a Federal question was raised and decided. Chief Justice Stone wrote:

> "While a certificate of the state court, made part of the record, to the effect that the federal question in issue was decided there is generally sufficient to sustain our jurisdiction, when it is consistent with the record * * *, a certificate to the same effect by the presiding justice of the state appellate court does not suffice, although it may serve to interpret indefinite or ambiguous evidence in the record, relied upon to show that the federal question was raised."

In any event, there is no indication in the record before this Court that the Kentucky Court of Appeals determined the Interstate Commerce Commission question on its merits, and it had no occasion to do so. The point was made so late in the litigation that the Court could not properly consider it, but was required by its own rules to reject it.

Under the settled law of Kentucky, the Court of Appeals does not determine questions not raised in the trial court.

> "It is an unvarying rule that a question not raised or adjudicated in the Court below cannot be considered when raised for the first time in this Court." *Combs, Judge,* v. *Knott County Fiscal Court,* 283 Ky. 456, 141 S. W. 2d 859 (1940).

To the same effect are *Tipton* v. *Brown,* 273 Ky. 496, 117 S. W. 2d 217 (1938) *Dorman* v. *Hook,* 260 Ky. 367, 85 S. W. 2d 1001 (1935); and, in more detail with citation of substantial authority, *Benefit Ass'n of Ry. Employees* v. *Secrest,* 239 Ky. 400, 411, 39 S. W. 2d 682, 686-7 (1931).

This question is therefore not properly before this Court for consideration.

Radio Station WOW v. *Johnson,* 326 U. S. 120 (1945), is closely in point. There, on rehearing, the question was raised whether the State court had any jurisdiction because primary jurisdiction was in the Federal Communications Commission. The Nebraska Supreme Court considered this point and decided it adversely on two grounds: first, it was unsound on the merits; second, it had not been raised by the pleadings. Since this Court does not review a State court decision resting on an adequate non-Federal ground, even though the State court has also decided the Federal question, this Court held that the question of primary jurisdiction was no longer open.

Thus the attempt to import the decision of the Federal question of the primary jurisdiction of the Interstate Commerce Commission into the case by means of a certificate of a justice of the Court of Appeals of Kentucky does not help petitioners. The Federal question was raised too late below. It is too late to raise it here.

5. The Injunction Does Not Infringe Upon the Jurisdiction of the Interstate Commerce Commission.

(a) THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION IS NOT EXCLUSIVE.

If this Court deems that the question of the exclusive jurisdiction of the Interstate Commerce Commission is open for its consideration, it is nevertheless submitted that petitioner's contention is wholly without merit.

The Interstate Commerce Act is not intended to occupy the entire field of transportation law so as to deprive State courts of all jurisdiction of cases arising under the Act; on the contrary, it expressly preserves existing statutory and common-law rights and remedies.

Section 9, 49 U. S. C. §9, provides that any person claiming to be damaged by any carrier may complain to the Commission *or* may bring suit in his own behalf, but must elect which remedy he will pursue.

Section 22, 49 U. S. C. §22, provides in part:

> "* * * nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies;"

Section 216 (j) of the same Act, 49 U. S. C. §316 (j), provides:

> "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

This Court, in *Missouri Pacific Ry.* v. *Larabee Flour Mills Co.*, 211 U. S. 612 (1909), upheld a judgment of the Supreme Court of Kansas requiring the Railroad to serve the Mills without discrimination, and disposed of the contention that jurisdiction of the Interstate Commerce Commission was exclusive, saying, at 619-620, 623-624:

> "The Missouri Pacific engaged in the business of transferring cars from the Santa Fe track to industries located at Stafford, and continued to do so for all parties except the mill company. So long as it engaged in such transfer it was bound to treat all industries at Stafford alike, and could not refuse to do for one that which it was doing for others. No legislative enactment, no special mandate from any commission, or other administrative board was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers. Whenever one engages in that business the obligation of equal service to all arises, and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts.
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> * * * * * * *
>
> "On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has entrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not

been held to interfere with the power of the state in these incidental matters. * * * Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the commission the control of the State over these incidental matters remains undisturbed. But it is further contended that this is not a mere incidental matter, indirectly affecting interstate commerce, but directly a part of such commerce, and therefore beyond the power of the State to control, and in support of that, *McNeill* v. *Southern Railway Company*, 202 U. S. 543, is referred to. There are many points of resemblance between that case and this, but there is this substantial distinction: In that was presented and determined solely the power of a state commission to make orders respecting the delivery of cars engaged in interstate commerce beyond the right of way of the carrier and to a private siding—an order which affected the movement of the cars prior to the completion of the transportation, while here is presented, as heretofore indicated, the question of the power of the State to prevent discrimination between shippers, and the common-law duty resting upon a carrier was enforced. This common-law duty the State, in a case like the present, may, at least in the absence of Congressional action, compel a carrier to discharge."

(b) NO QUESTION REQUIRING DETERMINATION BY THE INTERSTATE COMMERCE COMMISSION WAS PRESENTED BY THIS CASE, INASMUCH AS THE ILLEGALITY OF THE TRUCK DRIVERS' REFUSAL TO SERVE RESPONDENT WAS NEVER QUESTIONED, AND THE INJUNCTION ONLY APPLIES TO SITUATIONS WHERE UNREASONABLE DISCRIMINATION EXISTS.

The wrong which the injunction here sought to prevent was the arbitrary and unlawful refusal by drivers employed by common carriers to handle shipments to or from respondent's plant. This refusal was motivated solely by their desire to assist other members of the same union in their dispute with respondent's subsidiary. It was not based upon any difficulty or danger that would be encountered; there was none. It was not based upon any rule or practice of the employing carriers, for the carriers did everything in their power to persuade their employees to handle the goods, and never questioned their obligation, as carriers, to see that the shipments were moved. The carriers were not parties to the case, and the injunction is not directed at them. They were not doing anything which the Interstate Commerce Commission could forbid, nor refusing to do anything which the Commission could command. There was no administrative question between the carriers and respondent which called for exercise of the specially qualified jurisdiction of the Commission. As between the carriers and respondent there was no question at all.

That the State courts are authorized to grant relief in such situations was made clear in this Court's decision of *Pennsylvania Railroad* v. *Puritan Coal Mining Co.*, 237 U. S. 121 (1915), a suit brought in a State

court by a shipper to recover damages for the Railroad's discrimination in not furnishing as many cars as its own rules called for. In upholding the State court's judgment, this Court referred to the Interstate Commerce Act as follows, 237 U. S. at 130:

> "It gave shippers new rights, while at the same time preserving existing causes of action. It did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission; or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive."

Noting that the case had been treated as an offense against the common-law duty, the State statute, and the Federal statute, this Court held that the shipper was entitled to recover for breach of the common-law duty, 237 U. S. at 133, and that the question of fact involved was properly determinable by the State court, 237 U. S. at 131-2:

> "But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule, to plaintiff's damage. Such suits though against an interstate carrier for damages arising in interstate commerce may be prosecuted either in the state or Federal courts."

If it had been necessary to determine the reasonableness of the refusal to handle respondent's shipments, that question could have been determined by the State court as a question of fact under the foregoing authorities. But the injunction by its terms applies only to unreasonable discrimination and no evidence was offered that the refusal of the drivers in this case was other than unreasonable.

The only question in this case is a question of law uncomplicated by any matters of administrative discretion. The courts are the proper bodies to decide questions of law, and recourse need not be had to the Interstate Commerce Commission. *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, Milwaukee & St. Paul Ry.*, 271 U. S. 259, 262 (1926); *Great Northern Ry.* v. *Merchants Elevated Co.*, 259 U. S. 285 (1922); *Pennsylvania Railroad* v. *Somman Shaft Coal Co.*, 242 U. S. 120 (1916); *Pennsylvania Railroad* v. *International Coal Mining Co.*, 230 U. S. 184, 197 (1913); *Louisville & Nashville Railroad* v. *F. W. Cook Brewing Co.*, 223 U. S. 70, 84 (1912); *Pacific Gamble Robinson Co.* v. *Minneapolis & St. L. Ry.*, 83 F. Supp. 860 (D. Minn. 1949), appeal dismissed, 181 F. 2d 812 (8th Cir. 1950).

(c) THE INTERSTATE COMMERCE COMMISSION WAS WITHOUT POWER TO GRANT OR OBTAIN RELIEF AGAINST THE REFUSAL OF THE TRUCK DRIVERS TO PERFORM THEIR DUTIES.

The duty and authority of the Interstate Commerce Commission under Part II of the Interstate Commerce Act, 49 U. S. C. §§301 *et seq.*, is to regulate carriers by motor vehicle and to establish reasonable requirements

with respect to them and as to qualifications and maximum hours of service of employees and safety of operation and equipment.*

Except as hours of service and safety of operation are concerned, it does not appear that it was the intent of Congress to regulate the individual employees of the carriers.

The refusal of the carriers' employees to handle respondent's shipments was not a matter which affected the safety of the operations of the carriers. Consequently, we find no authority vested by this Act in the Commission under which it could have required the individual employees to perform their duties.

On the contrary, Section 222(b) of the Act, 49 U. S. C. §322(b), only authorizes the Commission to apply to the United States District Court for the enforcement of the provisions of the Act or of its rules and orders. And, while the District Court is generally authorized by this section to enforce obedience thereto by writ or injunction or by other process, it is prohibited by the Norris-Laguardia Act, 29 U. S. C. §104 (a),† from requiring the delinquent drivers to perform their duties.

Accordingly, it would have been impossible for respondent to obtain, through proceedings before the Interstate Commerce Commission, the relief which it obtained in the State court here.

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*Section 204, 49 U. S. C. § 304, Appendix B, p. 61.
†Appendix B, p. 61.

6. The Decision Below Properly Invalidated the Agreement Permitting Employees of Common Carriers to Refuse to Cross Picket Lines.

The collective bargaining agreement, in effect at the time of the strike against Suppliers, between Local 89 and the common carriers in and around Louisville contanied the following, in part:

> "It shall not be considered a violation of this Agreement for employees covered hereunder to refuse to cross a picket line of a Union or refuse to handle unfair goods."

The refusal of a carrier's employee to handle goods of a shipper with whom he has a personal quarrel is a crime under Kentucky law, as well as a violation of other Kentucky statutes. A private agreement between petitioners and their employer to the effect that commission of this crime "shall not be a violation of this Agreement" does not mean that it cannot be a violation of the laws of Kentucky and that thereby the employees have rendered the State of Kentucky powerless to enforce its laws against them. With equal logic it could be argued that the truck drivers in question could steal or destroy the shipper's goods, or set fire to its factory, if his employer by contract waived any objection to such conduct.

May any person—even a member of a union—by a private contract exempt himself from violation of the criminal law of his State, or from the consequences of his torts against third parties?

The court below disposed of the contention that the provision in petitioners' contract with their employer excused them from serving respondent as follows, 264 S. W. 2d 250 at 254-5:

> "* * * The legal duty of a common carrier to handle the merchandise of a shipper without discrimination existed long before the contract came into being, and, by like token, employees of such carriers, as long as they voluntarily remain in the hire of their employers, do not have the lawful right to withhold their services from a particular customer who deals with their employers. Here the common carriers and its employees seek by a contractual provision to avoid the responsibility imposed by a statute which implements a constitutional provision, and we hold that such a contractual stipulation is void."

In the language of Mr. Justice Holmes in *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 357 (1908):

> "* * * One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter."

And *Dillingham* v. *McLaughlin,* 264 U. S. 370, 374 (1924):

> "* * * The operation of reasonable laws for the protection of the public cannot be headed off by making contracts reaching into the future."

The situation here is analogous to *Local Union No. 10, United Association of Journeymen Plumbers & Steam Fitters* v. *Graham*, 345 U. S. 192 (1953). There a Virginia statute invalidated any agreement between any employer and any labor union whereby persons not union members would be denied the right to work for the employer. This Court upheld the Virginia statute in a case where a labor union sought to compel an employer to agree not to employ non-union men. Even if there had been a written agreement between the employer and the labor union in the *Graham* case whereby the employer agreed not to employ non-union men, it could not be held that such an agreement could supersede contrary State law. Similarly it cannot be argued in a situation such as *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949), that a written agreement between the parties could have taken the case out of the Missouri law against restraints of trade. Likewise it may not be argued now that an agreement between common carriers and the bargaining agent of their employees may abrogate the Kentucky law regulating common carriers.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 7, 1954.

APPENDIX A.

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, SECOND DIVISION.

No. 341 067

THE AMERICAN TOBACCO COMPANY, INC., - *Plaintiff,*

v.

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. of L., is the authorized representative for the purpose of collective bargaining of employees of American Suppliers, Inc., - *Defendants.*

OPINION.

Since the morning of March 30th this Union and its members and associates have been on strike and have maintained picket lines at, or adjacent to, the plant of American Suppliers. On April 6th, at the insistence of the plaintiff herein, American Tobacco Company, Inc., a restraining order was issued enjoining certain acts upon the part of the Union, and specifically prohibiting the Union from maintaining pickets at the Broadway entrance to plaintiff's property at 17th and Broadway and from refusing, through its members, to make deliveries of property shipped to the plaintiff or to induce or encourage others from making deliveries of such property.

The plaintiff professes to be a stranger to the labor dispute between defendants and American Suppliers, al-

though it is admitted that the last named corporation is a wholly owned subsidiary of plaintiff. Locally the two Corporations are indeed separately administered. Mr. John G. Hager is the Branch Manager of The American Tobacco Company, and Mr. W. B. Turner occupies a similar position with American Suppliers. Neither takes orders from the other, although they, of course, cooperate with each other. The superiors of both are in the Home Offices of the two Corporations at points outside of Kentucky. Since it is not denied, it must be presumed that somewhere in a higher echelon, perhaps as high as the Board of Directors of the parent Corporation, common control is exercised over all elements of both corporations, including the two local organizations. The physical layout of the plants is significant. In the local telephone directory both American Tobacco Company and American Suppliers are listed as being located at 1700 West Broadway in this City. The plant of American Suppliers is, loosely speaking, located in the middle of an industrial area, all of which is owned by The American Tobacco Company. Indeed, the ground upon which American Suppliers' plant was erected is owned by American Tobacco and leased to American Suppliers. American Suppliers' plant cannot be entered without crossing property owned by and under the control of American Tobacco. American Suppliers pays American Tobacco rental for the use of its property, but no witness could state the terms of the lease or whether there is a written lease. Except where the various factory buildings abut the perimeter of the plant area, a high fence serves to enclose it. Thus the whole property, including American Tobacco and American Suppliers, appears to the casual observer as the plant area of one industrial owner. No fence separates American Tobacco from American Suppliers.

American Suppliers buys raw tobacco, puts it through initial processing, sells it to American Tobacco, which further processes it into marketable products of cigarettes, etc. Mr. Turner testified that the entire output of Ameri-

can Suppliers is purchased by American Tobacco. A conveyor belt connecting the two plants delivers the processed tobacco from American Suppliers to American Tobacco.

Indicative of how closely enmeshed are the operations of the two Corporations is the undenied fact that a truck owned and operated by the American Suppliers displays an advertisement of Lucky Strike Cigarettes, a well known product of American Tobacco. Moreover, a building of American Suppliers located at 7th and Arcade (not involved in this injunction proceeding except incidentally), has a sign over its entrance "American Tobacco Company."

Occasionally employees of American Suppliers do work for American Tobacco, although when they do a record is kept and American Tobacco pays American Suppliers for such services. Employees of American Suppliers for several months now have been receiving four packages of American Tobacco Cigarettes as part of their weekly compensation. Separate cafeterias are maintained for the employees of the two Companies, and recently separate first aid facilities were established. If, however, an employee of American Suppliers is seriously injured or takes seriously ill, he or she is sent to the American Tobacco Hospital, there being no such facilities at American Suppliers' plant.

Much testimony was heard to the effect that certain gates, or entrances, were normally used by American Suppliers' employees and certain others by employees of American Tobacco, but at least one gate certainly was available to be used commonly by employees of both Corporations. The parking lot is also used by both Corporations. The power plant supplies steam to both Corporations, although American Tobacco renders statements according to "flow meter" readings to American Suppliers for the amount of steam that Corporation uses.

Under this set of facts the Union contends that its picketing against American Tobacco is primary and not secondary picketing.

At the outset the picketing was not peaceful. There was much testimony relative to the vulgar and insulting lan-

guage used by pickets to other employees crossing the picket lines. Among other things, Union members are accused of having called those crossing the picket lines "hound dog". In a spirit of levity the Union insisted in Court that the term "hound dog" was not used as an insult but rather insisted that the pickets were merely repeating the words of a popular song, allegedly one of the current favorites on the radio. The Court would be inclined to accept this explanation if it were not for the fact that "hound dog" was one of much milder insults that the Union members were accused of employing. The Court is satisfied from the testimony that much stronger and much more vulgar and vituperative language was freely indulged in by the pickets.

Worse, however, than the language were acts of violence indulged in by the pickets. The Court is convinced that there was shoving and tripping of other employees. There was mass picketing. Auto tires of other persons were punctured. Ice picks were used. Roofing nails were scattered in driveways. On a few occasions bricks were hurled. Some damage, including a broken flood light, was caused. One truck had all four tires slashed. This conduct is inexcusable.

In addition there is evidence that the strike has been conducted in an atmosphere of threats.

With this factual background, the Court is confronted with two serious legal issues. First, the Union contends that the Taft-Hartley Act vests the N.L.R.B. and Federal Authority with exclusive jurisdiction to enjoin picketing which amounts to a secondary boycott and, therefore, claims that this Court is without jurisdiction. Counsel cite a California case, Gerry of California v. Superior Court, 194 F. 2d 689, and a Minnesota case, Norris Grain Co. v. Nordaas, 46 N. W. 2d 94. Both involved acts amounting to secondary boycotting. In holding that the Federal Authority was exclusive, the California Court specifically based its opinion on the fact that the "Union objective and the means employed to attain it were not unlawful inso-

far as the law of this State is concerned". The only challenge made against the Union activity was that it violated the Taft-Hartley Act.

The Minnesota case was a writ of prohibition proceeding in which the State Court was prohibited from proceeding with an injunction restraining the Union from engaging in picketing which amounted to a secondary boycott. Both the National Labor Relations Act and the Minnesota Act contained provisions outlawing secondary boycotts. The Court held that the Federal Act vested exclusive jurisdiction in the N.L.R.B. to enforce the provisions against secondary boycotting.

It does not appear that any contention was made before the Minnesota Court that State Courts have the power to protect the private property of the State's citizens against any otherwise unlawful acts committed against such private property. The only unlawful acts complained of were the secondary boycott acts, which were claimed to be unfair labor practice contrary to both Minnesota and Federal law.

In the situation before this Court, counsel for the Union insists that, if the acts of the Union in picketing American Tobacco are unlawful in any way, they are unlawful only because they constitute a secondary boycott, and they, therefore, must come within the exclusive jurisdiction of the N.L.R.B. With this the Court cannot agree.

If the Union pickets American Tobacco when it has no dispute whatsoever with American Tobacco (conceding for the purpose of this discussion that American Tobacco is a stranger to this labor dispute), and by so doing coerces or influences persons not to make deliveries of needed merchandise and material to American Tobacco, the American Tobacco Company is placed in position to suffer irreparable damages. A wrong has been committed against it for which there should be a remedy. It may be that that wrong constitutes a secondary boycott which could give rise to a remedy under the Taft-Hartley Act. But that wrong also constitutes a violation of Kentucky law in a field not

covered exclusively by the Federal Act. It is violative of the Kentucky Constitutional provisions, which seek to protect the private property of our citizens and also contrary to K.R.S. 336.130, not necessarily because it is a secondary boycott but because it is an unfair and illegal act calculated to cause irreparable damage to plaintiff.

The Court is fortified in its opinion by the recent opinion of the Court of Appeals in the Blue Boar Cafeteria Co. v. Hotel and Restaurant Employees, 254 S. W. 2d 335. There the question of the right peacefully to picket was held not to be exclusively a Federal question controlled alone by the Freedom of Speech Amendment to the Federal Constitution, but, rather it was held to be determined by the public policy of Kentucky as announced in K.R.S. 336.130 and as interpreted by the Courts. This holding was in keeping with several decisions of the Supreme Court of the United States, cited in the opinion of the Blue Boar case. It is true that the Blue Boar case did not involve interstate commerce. However, in the opinion of this Court, the interstate commerce of plaintiff would deprive this Court of jurisdiction only if the sole basis of this Court's asserted jurisdiction was that the acts constituted a secondary boycott. Lay aside for the moment the issue of American Suppliers being a wholly owned subsidiary of American Tobacco, in the absence of that issue, the acts committed by the Union against American Tobacco would amount to a wrong against American Tobac , whether or not they also constitute a secondary boycott.

Numerous cases were cited by plaintiff sustaining the right of state courts to exercise traditional police power to suppress violence, protect property, etc. The following quotation from Erwin Mills v. Textile Workers Union of America, C.I.O., 67 S. E. 2d 372, 234 N. C. 321, is a clear statement of the function of the state courts in these matters:

> "In our opinion there is nothing in the provisions of the Taft-Hartley Act or in the decisions of the

Supreme Court of the United States in construing the provisions thereof that interferes with the right of a State to exercise its traditional police power to suppress violence, to prevent breaches of the peace, to prevent an employer and his employees from being intimidated by violence or the threat of violence or to protect property and to safeguard its lawful use during a strike or labor dispute. The proper exercise of such power does not impinge upon the lawful rights of labor within the purview of the Constitution of this State, the Constitution of the United States, or the Taft-Hartley Act."

The other legal question arises from the American Tobacco Company's claim to be a total stranger to the labor dispute between the Union and American Suppliers. To support this claim, plaintiff relies upon the separate entities of the two Corporations and cites two cases involving labor matters, one the case of N.L.R.B. v. Timken Silent Automatic Co., 114 F. 2d 449 and State v. Casselman, 205 P. 2d 1131, an Idaho case.

It is not believed that the Timken case is authority on the issue here involved. There, the N.L.R.B. was attempting to enforce one of its orders against a subsidiary corporation and the court held that, in the absence of a showing that the parent corporation controlled the subsidiary in such manner as to bring about a wrong or a fraud, the two corporations could not be treated as one. The question there was the enforcement of an order against a corporation. It did not involve the question of whether the picketing of a parent corporation amounted to a primary rather than the secondary picketing. Even in the situation there considered, a strong dissenting opinion was written. The Idaho Court affirmed a conviction of pickets for engaging in secondary picketing contrary to an Idaho Statute. There, two subsidiary corporations of American Telephone and Telegraph Co., The Mountain States Telephone and Telegraph Co., and the Western Electric Company, both had labor disputes with different Unions. The Telephone Company settled its dispute, and the union of the Electric

Company continued to picket the Telephone Company. Prosecution ensued.

It was contended by the Union that the picketing was primary and not secondary, because both Companies were wholly owned by American Telephone and Telegraph and, therefore, the corporate veil should be pierced. The Idaho Court held otherwise, pointing out that the operation of the two corporate entities was not shown to be a subterfuge or an evasion. The Court relied on the fact that Western Electric had been organized in 1881 and sold its products in other fields than that engaged in by the Telephone Company and it also sold them throughout the United States, while the Telephone Company involved operated in only seven states.

The Court pointed out that both Unions and Employers recognized that the two labor disputes against the two different Companies were separate and distinct disputes. In making ultimate settlement of both labor disputes, both Unions and Employers treated and recognized the disputes as distinct from each other.

We do not have a similar situation here. The strike is not yet settled, and far from recognizing that American Tobacco is not a party to its dispute, the Labor Union is strenuously claiming that it is such party.

The Idaho Court also pointed out that it was stipulated therein that the parent Company, American Telephone and Telegraph had no power to represent the subsidiary and, hence, "no power to bind or control them, and the separate settlements show the constituant unions acquiesced in this. If the parent had no control, the subsidiary would have had even less over another subsidiary". The Idaho Court pointed out that these two subsidiaries were part of a total of twenty-three corporate subsidiaries of the parent, American Telephone and Telegraph.

We do not have that situation here. It is true that Mr. Hager manages American Tobacco and Mr. Turner manages American Suppliers and locally have no control over each other. But, as pointed out above, it must be presumed

that, since American Suppliers is a wholly owned subsidiary, in some higher echelon there is a common control over the local offices of both Corporations.

The right of a union to conduct a strike is a powerful weapon in its hands. The Taft-Hartley Act, other Federal Laws, and the laws of the Commonwealth of Kentucky all tend to sustain the right of the Union so to strike. Unquestionably, here the Union has the right to strike against American Suppliers as the primary employer of the Union. To hold that picketing American Tobacco Company would be secondary picketing rather than primary picketing solely on the ground that the two Companies have separate corporate entities might well serve to deprive the Union of the powerful weapon which our laws intend to preserve.

In 16 A.L.R. 2d at page 778, the annotator discussing the effect of community of interest between primary and secondary employers upon the legality of an alleged secondary boycott, makes these very pertinent remarks:

> "An important factor in determining whether the activities of a union against an employer other than the one with which the union has a labor dispute come within the purview of the secondary boycott, is the relationship between the two employers. If the relationship is so close that one may be regarded as the ally of the other, picketing of the one may be permissible during a labor dispute with the other."

An interesting case is that of Douds v. Metropolitan Federation of Architects, 75 F. Supp. 672. That case involved the construction of Section 8 (b) (4) A of the Taft-Hartley Act, as applicable to a strike conducted by the union recognized by Ebasco Corporation, during which the union also picketed a partnership known as Project, which subcontracted much of Ebasco's work. Although the Corporation and partnership had no common ownership of any kind, the Court held the picketing to be primary rather than secondary. While it is true we are not here construing the Taft-Hartley Act, the Douds case is authority for the proposition that mere differences of legal entities, such as

these two different corporate structures are not conclusive of the question of neutrality in a labor dispute. The District Judge had this to say on this question:

> "I am unable to hold that corporate ownership or insulation of legal interests between two businesses can be conclusive as to neutrality or disinterestedness in a labor dispute."

And,

> "To suggest that Project had no interest in the dispute between Ebasco and its employees is to look at the form and remain blind to substance".

Unquestionably, American Tobacco is interested in American Suppliers' labor dispute. Geographically the two Companies are so closely enmeshed as to make it almost impossible to separate them. Ownership of the two Companies is identical. The only thing that separates the two Companies is corporate entity. In the opinion of this Court, this fact does not constitute American Tobacco a neutral or a total stranger in this strike. American Tobacco rather is an ally of American Suppliers.

In the case of Whitt v. Stephens, 246 S. W. 2d 996, the Court of Appeals of Kentucky refused to consider the opening of a new drift mouth in a seam of coal by the same owner to be such a different operation as to deny the right of the union men to picket the newly opened entrance, although the union had had a contract with the owner concerning the former entrance to this seam of coal only. Thus, identity of ownership has been considered by our Court of Appeals in a labor dispute, although the question of corporate entities was not considered.

In Boyd v. Deena Artware, 239 S. W. 2d 86, our Court of Appeals held that a union could picket not only the plant of the employer, but also the area immediately adjacent to the plant upon which an independent contractor was erecting a new plant for the employer. It might be said that in that case the Court of Appeals implied that, if

the independent contractor had been seeking to enjoin the picketing and if such independent contractor could have established himself as a complete stranger to the labor dispute, the Court may have enjoined the picketing. As stated above, however, under the facts of this case, American Tobacco cannot be considered a complete stranger to the labor dispute.

It is, therefore, the opinion of the Court that the Union has the right peacefully to picket American Tobacco. Since the testimony in this case has disclosed that the picketing in this case has not been conducted in a peaceful atmosphere, an injunction should be granted but in different terms from the restraining order. The number of pickets will be limited. All violence will be enjoined. Threats of injury and reprisal will be enjoined. Use of abusive language will be enjoined. Counsel will meet with the Court to discuss the exact terms of the injunction.

CONTEMPT PROCEEDING.

Along with the hearing on the injunction, the Court also heard a rule for contempt against various members of the Union. This contempt arose out of the alleged refusal of certain members of the Union who were employed by the Bowling Green Express Company to handle merchandise for delivery to American Tobacco Company. The restraining order prohibited the members of the Union and its associates "from refusing or inducing, encouraging, or otherwise causing or arranging with, the employees of other employers, particularly common carriers, or with such employers to refuse to accept, handle, transport and deliver in accordance with their legal and contract obligations property shipped by or to plaintiff."

The seven employees of the Bowling Green Express Co. attempted to excuse their conduct in failing to make deliveries by saying that they had not "directly" been asked to handle the merchandise until the morning of the day they testified in Court. The Court is convinced that,

whether or not these seven members were directly asked to handle this goods for delivery to American Tobacco Company, all seven of them understood that they were being asked indirectly to handle the goods. The seven also professed to have had no knowledge of the restraining order that had been issued in this action. It is difficult for the Court to believe that these men had no knowledge whatsoever of the restraining order. It is true that several of them testified that they didn't know what a restraining order was, but the Court feels that these seven men knew that some sort of Court Order existed and further knew enough about that Court Order to realize that it required them to make deliveries. The effect of their claimed ignorance of the restraining order is completely lost to them by reason of the fact that on the morning of the day on which they testified in Court, after knowing that a restraining order was in existence, these men defiantly and admittedly again refused to handle the deliveries.

The Court has already dismissed the contempt rule against Paul Priddy, Stoy Decker and Marion N. Winstead, for the reason that no testimony directly involved these three men in the disobedience of the Court's order. In addition to the seven employees of the Bowling Green Express Company, Virgil Denton was also accused of contempt. He was called over the telephone by Mr. Berry of the Bowling Green Express Company and asked for assistance in getting the employees of Bowling Green Express to make the deliveries. Mr. Denton did not testify in Court but filed an affidavit explaining his conduct. The Court is not convinced from that affidavit that Mr. Denton had no part in encouraging the refusal to handle this goods for delivery to the plaintiff. He may not have directly refused or directly coerced, but he at least indirectly encouraged or induced the refusal. As Assistant Business Agent for the Union, it is believed that if Mr. Denton had acted as he should have under the circumstances the deliveries would have been made.

As it turns out, the Court is of the opinion that the restraining order was erroneous in that it went too far and in that it was based upon the theory that American Tobacco Company was a stranger to the labor dispute. Restraining orders, however, are necessarily issued in haste in order to prevent irreparable injury. Under certain circumstances restraining orders may be issued by a clerk in the absence of a judge of a court. Whether issued properly or erroneously, restraining orders must be obeyed. If improperly issued, the right place to correct the mistake is in Court. Persons affected by the order cannot take the law into their own hands and assume to disobey a court order. Consequently, it is the Court's judgment that Robert Smith, Charles Moore, Delmar Hightower, Jacob Lee, Jr., Christopher Evans, Ernest Spencer, Fred Ham and Virgil Denton are guilty of contempt and each is fined the sum of $30.00. No fine is levied against the Union in regard to these contempts for the reason that, although these persons may have acted in behalf of the Union in committing their individual contempts, there is considerable evidence that in regard to the delivery of other goods to the plaintiff the Union Officials strictly adhered to the restraining order.

STUART E. LAMPE,
Judge.

COURT OF APPEALS OF KENTUCKY

June 2, 1953

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, ET AL., - - *Appellants,*

v.

THE AMERICAN TOBACCO COMPANY, INC., - *Appellees.*

Appeal from Jefferson Circuit Court,
Chancery Branch, Second Division,
Honorable Stuart Lampe, Judge.

OPINION OF THE COURT BY JUDGE STEWART, AFFIRMING ON THE APPEAL AND ON THE CROSS-APPEAL.

Two questions are presented for determination on this appeal and cross-appeal:

1. Are the pickets around the property of the American Tobacco Company, herein referred to as "American," at 17th and Broadway Streets in Louisville, involved in primary or secondary picketing, since the strike is conducted at the same address against American Suppliers, Incorporated, herein called "Suppliers"?

2. May a driver of a common or contract carrier be compelled against his wishes by injunctive process to cross a picket line advertising a lawful strike, when the driver

NOTE:

Language appearing in the first opinion but omitted in the second opinion is in boldface type.

Language added in the second opinion is in italics.

is a member of the same union that is conducting the strike, but he is not on strike himself?

We have chosen to consider the cross-appeal, or question No. 1, first.

On March 30, 1952, Local Union No. 89 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America of the American Federation of Labor, hereinafter referred to as "Local 89" for the sake of brevity, called a strike against Suppliers and threw picket lines around four of its establishments *in Louisville*, viz.: A redrying plant at 9th and Magnolia Streets; an office with a small warehouse attached at 908 South 8th Street; a group of warehouses at 7th Street and Arcade Avenue; and a "stemmery" situated upon American's property at 17th and Broadway Streets. Suppliers is a subsidiary of American, but it is not a party to this appeal.

It is the picketing on all sides at the last mentioned location that is the bone of contention. The stemmery is situated on ground owned by American and is completely surrounded by American's cigarette factory, its auxiliary structures and its fences. American maintains that its main gates are on Broadway and that they are not and have never been used for ingress and egress of either personnel or materials of Suppliers except to some small extent. On the other hand it states that access can be had to Suppliers for all purposes from 17th Street. It is therefore perfectly practical, American argues, to set aside the entire side on Broadway for its exclusive use and thereby prevent it from becoming entangled in the labor dispute that exists only between Local 89 and Suppliers. Furthermore, American asserts it is engulfed in this controversy solely because of its corporate and geographical relations with Suppliers, but that there is not now and there has never been any affiliation between its employees and Local 89, so that it is being subjected to a secondary boycott by the conduct of the union, and that the sphere of picketing can and should be restricted to the disputants in such

a manner as to relieve it from *the* damaging results that flow therefrom. Local 89 takes the position that the picketing is primary, proper and legal. The Chancellor adopted the view of Local 89, and American has cross-appealed from the judgment in this respect. Accordingly, we must search the record to resolve whether this finding has a reasonable basis in the evidence.

We have mentioned the physical layout of the stemmery. Aside from this, American and Suppliers have an economic interdependence; or, it might be said that Suppliers is the child of American, its parent, because the latter owns all the capital stock in the former. Suppliers buys raw tobacco and puts it through a certain process at the stemmery. The tobacco is then transported from the stemmery to American's cigarette factory by means of a conveyor belt which runs from one to the other. Suppliers sells all its tobacco to American. It was brought out that American owns not only the land but the improvements employed by Suppliers in the operation of the stemmery. There was testimony that Suppliers leased the ground and the plant and paid rent to American for the use of the same; however, the terms of the lease and the amount of the rent were unknown to the local officials of either corporation. A central power plant on the property supplies steam to the facilities of both corporations, Suppliers paying for this service. The trucks of Suppliers *display* **(carry)** advertisements of "Lucky Strike," a well-known manufactured product of American. Over the entrance of another plant of Suppliers at 7th *Street* and Acade *Avenue* **(Streets)**, which is not immediately connected with this litigation, the name on the sign reads: "American Tobacco Company." At times employees of Suppliers work for American and the latter pays the former for such services. Employees of Suppliers also receive four packages of American made cigarettes as a part of their weekly compensation. If an employee of Suppliers is badly injured or becomes seriously ill, that person is sent to American's hospital for treatment. To sum up, Suppliers and American operate

as a unit, except that each in a corporate entity and each is under separate management locally.

In the light of the foregoing factual background, we are confronted with this question: Is American a neutral in the existent dispute between Suppliers and Local 89? The test to be applied in arriving at a proper conclusion on this point ma be thus stated: "An important factor in determining whether the activities of a union against an employer other than the one with which the union has a labor dispute come within the purview of the secondary boycott provision is the relationship between the two employers. If the relationship is so close that one may be regarded as the 'ally' of the other, picketing of one may be permissible during a labor dispute with the other." See 16 A. L. R., 2d, paragraph 6, page 6. However, we are not without precedent on this subject in this jurisdiction.

In the recent case of Local 181, etc. v. Broadway and Fourth Avenue Realty Company, Ky., 248 S. W. 2d 713, a strike involved a corporation which owned and operated the Brown Hotel and the Kentucky Hotel and another corporation which owned and operated the Martin Brown Building, all located in Louisville. Both corporations were, except for qualifying shares, entirely owned by Mr. Graham Brown. In *that case* **(this opinion)** in passing on a contempt proceeding, we not only treated the whole controversy as a single labor dispute but we considered Mr. Graham Brown and the two corporations as in reality one and the same. There we said:

> "Supporting the conclusion that this is in the broad sense one labor dispute, is the fact that when the strike first commenced, picketing was begun at the Martin Brown Building, as well as the two hotels, although at that time there was no claim of a labor dispute affecting the employes of the Martin Brwon Building.
>
> "In the eyes of the public, this has been a strike against Mr. Graham Brown, and the acts of vicience have been committed by persons having a labor dispute with Mr. Brown."

We think the industrial alliance between Suppliers and American is so close that both may be considered as one operation. From the standpoint of physical setup the two are so enmeshed that they cannot be split apart without doing violence to both. To suggest that American has no interest in the dispute between Suppliers and Local 89 is to look at the form and remain blind to the substance. Nor can the naked claim of corporate separability be raised as a bar to picketing the primary employer at 17th and Broadway Streets. To remove the pickets from any side of this property would be to remove them from Suppliers at that location. It cannot, therefore, be said that American is a neutral under the circumstances and that the picketing amounts to a secondary boycott at the above address. We conclude that the Chancellor correctly disposed of this issue.

Local 89 seeks by its appeal to nullify so much of the injunction as requires a driver of a common or contract carrier to cross against his will a picket line where a strike is in progress. It so happens in this instance that the carrier employees are members of the same union as those conducting the strike against Suppliers. It should be emphasized, however, that they refuse to handle freight for American while remaining in the service of their employer.

The rule of law that common carriers and their employees must serve all members of the public without discrimination is firmly established in Kentucky and, so far as we can find, in all the states. Its origin goes far back into the common law. Section 196 of the Constitution of Kentucky embodies the principle in this language: "Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability." Subsections 1 and 2 of KRS 281.685 read in part that no common or contract carrier shall "subject any person to any unreasonable discrimination." KRS 281.990(1) stipulates that any person who "violates, or

causes, aids or abets any violation of, any of the provisions of this chapter," which includes KRS 281.685(1) and (2), "shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days or both."

(The foregoing doctrine is set forth at length). *See also* 9 Am. Jur., Carriers, section 286, pages 607-608, and in 13 C. J. S., Carriers, section 27, pages 61-62.

In Burlington Transp. Co. v. Hathaway (Iowa, 1943), 12 N. W. 2d 167, a suit was brought by certain common carriers as plaintiffs against the teamsters, chauffeurs, warehousemen and helpers union and its business agents as defendants to enjoin the latter from requiring employees of the union to refuse to handle the goods of John Blaul's Sons Company, a wholesale grocery company in Burlington, Iowa, which the union was attempting to organize. A picket line had been thrown around the grocery company and the employees of the union refused to transport freight for the grocery company. The Iowa statute as to non-discrimination by carriers is similar to Kentucky's. The substance of the court's decision is as follows:

> "When the plaintiffs obtained their permits to operate as common carriers, they undertook the duty to transport the freight which the public tendered to them for transportation. The failure to carry out this duty to transport would not be excused by showing that its employees refused to obey the employers' order. See Chicago B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., et al., C. C., 34 F. 481, and Consolidated Freight Lines, Inc., et al., v. Department of Public Service, et al., 200 Wash. 659, 94 P. 2d 484, 485. In the last cited case a strike of laundry workers at the Davenport Hotel in Spokane resulted in a picket line around that hotel. Certain common carrier truck lines, who had been serving the hotel in the capacity of picking up freight or baggage and delivering it anywhere in the State of Washington or in the channels of interstate commerce, refused to send their trucks through the picket line at the hotel because the local

manager of the teamsters' union threatened to call a strike of the carriers' drivers if they were permitted to go through the picket line. The hotel filed a complaint with the Department of Public Service against the carriers for the cancellation of their permits as common carriers. This resulted in an order suspending temporarily the permits under which the carriers operated. Upon appeal the action of the Commission was affirmed, the Supreme Court of Washington stating: 'The question then arises whether the appellants were excused by reason of the law. They being common carriers, it was their duty, under the facts and circumstances of this case, to send their trucks through the picket line. 13 C. J. S., Carriers, p. 407,sec. 202; Moore on Carriers, 2d Ed., Vol. 1, p. 124; Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., C. C., 34 F. 481; Burgess Bros. Co. v. Stewart, 112 Misc. 347, 184 N. Y. S. 199.'

* * * * * * * *

"From the above it is clear that if the plaintiffs were to do that which the union sought to compel them to do, namely, not handle the Blaul merchandise, they would be doing an act prohibited by the common law and the statutory law of this state and an act that could subject them to criminal prosecution.

* * * * * * * *

"There was no labor dispute between plaintiffs and their employees or between plaintiffs and the defendant union. The union cannot concertedly exert, in aid of their labor dispute with Blaul, any economic pressure to compel these plaintiffs to do that which the law and public policy forbid. The injunction was rightly issued."

These cases support the rule laid down in the Hathaway case: Pacific Gamble Robinson Co. v. Minneapolis & St. Louis R. Co., (D. C. Minn., 1952) 105 F. Supp. 794; Northwestern Pacific R. Co. v. Lumber & Sawmill Workers Union, etc., (Cal., 1948) 189 Pac. 2d 277; Turner v. Zanes, (Tex., 1947) 206 S. W. 2d 144.

Counsel for Local 89 admit that the Hathaway case correctly sets forth the law on the issue raised by the ap-

peal as of the date it was decided, namely, in 1943, but they insist that the Labor-Management Relations Act of 1947, commonly called the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U. S. C. A., Sec. 151 et seq. (Supp., 1952), makes the question under discussion one exclusively controlled by **(the above)** *this* enactment. To fortify this position, reliance is had upon this part of 29 U. S. C. A., Sec. 158, also known as 8 (b) (4) (D), *of the Act*, which is as follows: "* * * provided, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by representative of such employee**(s)** whom such employer is required to recognize under this sub-chapter."

(We do not agree with this line of reasoning. Section 8 (b) (4) (A), (B), (C) and (D) of the Labor-Management Relations Act of 1947 was clearly intended to outlaw only a secondary boycott, and such is not involved in the issue under consideration. See Picketing-Free Speech, Tanenhaus, Cornell Law Quarterly, Fall, 1952, Vol. 38, No. 1, pages 1 to 50; and see also the statement of Senator Taft in 93 Cong. Rec., page 4198. Nor does the above quoted provision purport to make lawful any act which aside from the statute in question is unlawful.) The appeal **(here)** involves the refusal of employees of *common or contract* carriers who *are not on strike but who* happen to belong to Local 89, the bargaining representative of Suppliers' employees, to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, *the statutory law and the Constitution of Kentucky.* **(the constitutional law and the statutory law of Kentucky.) (More than that)**, *Aside from this, as we have shown*, the illegal conduct of the employees could subject them to criminal prosecution. *We find nothing in the provisions of the above Act or in the decisions of the Supreme Court of the*

United States construing it that makes such conduct legal when from time immemorial the several states have branded it as illegal. Furthermore, the Supreme Court has taken the position that federal jurisdiction cannot be invoked to protect a course of action, such as that in this case, that would be in conflict with the declared public policy of a state. See Local Union No. 10 v. Graham, 344 U. S. 811, and the cases cited therein. It follows that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States *but that the order does, on the contrary, enforce obedience to the law and Constitution of the Commonwealth and, as a consequence, it was proper.*

Finally, the employees of the carriers rely upon a provision of the agreement between themselves and their employers covering the period from February 1, 1952, to January 31, 1955, to the effect that it shall not be a violation of their contract or a cause for discharge to refuse to go through the picket line of a union or to refuse to handle unfair goods. They insist that this stipulation excuses them from serving American. The legal duty of a common carrier to handle the merchandise of a shipper without discrimination existed long before the contract came into being, and, by like token, employees of *such* **(common)** carriers, as long as they voluntarily remain in the hire of their employer, do not have the lawful right to withhold their services from a particular customer who deals with their employer. *Here* **(Where)** the common carrier and its employees seek by a contractual provision to avoid the responsibility imposed by *a* statute, *which implements a constitutional provision, and we hold that* such a contractual stipulation is void. **(Such is the case here.)**

The question of whether a contempt has been committed is left for the Chancellor's determination. Our reason for this ruling is that the contempt, if any, is continuous in its nature and it should not be handled piecemeal. Be-

sides, the Chancellor is on the ground, is familiar with the background of this suit and is in a better position to hear the evidence; therefore, this phase of the case can be more expeditiously handled for all concerned in the lower court.

It appears to us that an emergency exists in this case and a mandate shall issue forthwith without prejudice to the right to file a petition for a rehearing.

The judgment is affirmed on the appeal and on the cross-appeal.

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APPENDIX B.

Constitution of Kentucky,

Section 196:

> *"Regulation of common carriers; no relief from common law liability.* Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability."

Kentucky Revised Statutes,

Chapter 281,
Section 281.685:

> *"Adherence to rates, fares, charges, and schedules; discrimination.* (1) No common carrier shall charge, demand, collect or receive a greater, less or different compensation for the transportation of persons or property or for any service in connection therewith, than the rates, fares and charges specified in its tariffs and classifications filed with the department and in effect at the time; nor shall any common carrier refund or remit any part of the rates, fares or charges so specified, or make or give any unreasonable preference or advantage to any persons, or subject any person to any unreasonable discrimination.
>
> "(2) No contract carrier shall charge, demand, collect or receive a greater, less or different compensation for the transportation of persons or property or for any service in connection therewith than that contained in the contract required to be filed with the department and in effect at the time; nor shall any contract carrier refund or remit any part of the charges specified in the contract, or make or give any unreasonable preference or advantage to any person, or subject any person to any unreasonable discrimination."

Section 281.990:

"*Penalties.* (1) Any person who violates, or causes, aids or abets any violation of, any of the provisions of this chapter or any order, rule or regulation lawfully issued pursuant to authority granted by this chapter, or who knowingly makes any false or erroneous statement, report or representation to the Department of Motor Transportation with respect to any matter placed under the jurisdiction of the department by this chapter, or who knowingly makes any false entry in the accounts or records required to be kept pursuant to the authority granted by this chapter, or who knowingly fails to keep or knowingly destroys or mutilates, any such accounts or records, shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days, or both. Every device to evade or to prevent the application of any provision of this chapter, or any lawful order, rule or regulation of the department issued pursuant thereto, shall constitute a violation thereof."

49 USC Sec. 304 (1) and (2):

"*Powers and duties of commission*—(a) *Powers and duties generally.*

"It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and

maximum hours of service of employees, and safety of operation and equipment."

29 USC Sec. 104 (a):

"*Enumeration of specific acts not subject to restraining orders or injunctions.*

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment";

29 USC Sec. 158(b)(4):

"It shall be an unfair labor practice for a labor organization or its agents—

"(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representa-